INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	14

CITATIONS

Cases:

Agnello v. *United States*, 269 U. S. 20	8
Ayers v. *United States*, 58 F. (2d) 607	12
Barton v. *United States*, 267 Fed. 174	12
Caha v. *United States*, 152 U. S. 211	11
Cardenti v. *United States*, 24 F. (2d) 782	12
Chicco v. *United States*, 284 Fed. 434	8
Crinnian v. *United States*, 1 F. (2d) 643	11
Dooley, In re, 48 F. (2d) 121	8
Giacolone v. *United States*, 13 F. (2d) 108	12
Graham v. *United States*, 15 F. (2d) 740	8
Hoyt v. *Russell*, 117 U. S. 401	11
Lewis v. *United States*, 6 F. (2d) 222	8
Mangiaracina v. *United States*, 40 F. (2d) 164	12
Mansbach v. *United States*, 11 F. (2d) 221	13
Stark v. *United States*, 44 F. (2d) 946	12
Taylor v. *United States*, 286 U. S. 1	10
United States v. *Jackson*, 104 U. S. 41	11
United States v. *Messina*, 36 F. (2d) 699	8

Statutes:

Criminal Code, Sec. 332 (U. S. C., Title 18, Sec. 550)	13
Revised Statutes—	
Sec. 3247 (U. S. C., Title 26, Sec. 241)	2
Sec. 3257 (U. S. C., Title 26, Sec. 261)	3
Sec. 3258 (U. S. C., Title 26, Sec. 281)	3, 13
Sec. 3259 (U. S. C., Title 26, Sec. 282)	13
Sec. 3260 (U. S. C., Title 26, Sec. 284)	2, 13
Sec. 3281 (U. S. C., Title 26, Sec. 306)	2

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 594

PETER ROSSI AND EDWARD EHRETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 52–54) is reported in 60 F. (2d) 955.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1932. (R. 55.) A petition for rehearing was denied October 7, 1932. (R. 56.) The petition for certiorari was filed January 4, 1933. While petitioners do not so state, presumably they invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal contention urged by petitioners is that their motion to suppress evidence was erroneously denied.

They further assert, without argument in support of the assertion, that the evidence was insufficient to support their conviction because it failed to show (a) that any offense was committed within the Internal Revenue Collection District or Prohibition District specified in the indictment; (b) that the still which petitioners were alleged to have set up was not registered with the appropriate prohibition administrator; (c) that the required bond was not given; and (d) that petitioners were persons who were required to register such still and to furnish such bond.

STATEMENT

Petitioners were indicted in the District Court of the United States for the Southern District of Illinois upon five counts. The first and second counts each charged the carrying on of the business of a distiller with intent to defraud the United States of the tax on the spirits distilled. (Sec. 3281, R. S.;[1] U. S. C., Title 26, Sec. 306.) The third count charged the carrying on of such business without having given the bond required by law. (Sec. 3260, R. S.;[2] U. S. C., Title 26, Sec. 284.) The fourth

[1] See also Sec. 3247, R. S.; U. S. C., Title 26, Sec. 241.
[2] See also Sec. 3281, R. S.; U. S. C., Title 26, Sec. 306.

count charged the possession of a still without the same being registered as required by law. (Sec. 3258, R. S.; U. S. C., Title 26, Sec. 281.) The fifth count charged that having engaged in carrying on the business of a distiller the defendants did "defraud and attempt to defraud" the United States of the tax on the spirits distilled. (Sec. 3257, R. S.;[3] U. S. C., Title 26, Sec. 261.) (R. 1–7.)

Prior to trial petitioners moved to suppress certain evidence as having been obtained in the search of a private dwelling by Federal prohibition agents who had no search warrant or other authority for such search. (R. 11–12.) Decision on the motion was postponed pending the hearing of the evidence offered at the trial (R. 13), and the motion was eventually denied (R. 27). A trial by jury having been waived in writing (R. 13), the case was tried to the court, which found petitioners guilty on all counts (R. 30). The conviction on the fifth count was subsequently set aside and petitioners found not guilty on that count. (R. 10.) Following the denial of motions for a new trial and in arrest of judgment (R. 30–32), the court sentenced each of the petitioners to serve eighteen months' imprisonment on each of the first, second, and third counts, the sentences to run concurrently; to serve eighteen months' imprisonment on the fourth count, the sentence to run consecutively to those imposed upon the first three counts; and to pay a fine of

[3] See footnote 2, *supra*.

$500 on each of the first, third, and fourth counts (R. 9–10). Upon an appeal to the Circuit Court of Appeals the judgment was affirmed. (R. 55.)

The evidence for the Government at the trial tended to establish the following facts: On September 8, 1929, Federal Prohibition Agent Wheeler smelled the odor of fermenting mash emanating from the one-story frame building at 1516 South Fifth Street, Pekin, Illinois, and heard the buzz or hum of an electric pump in the basement. (R. 14.) He returned to the premises on September 10, 1929, accompanied by Agent Johnson and other Federal prohibition agents. As the officers drove up to the place they smelled the odor of cooking alcohol. (R. 17, 20.) Two went around the building on one side and two on the other side to the rear, where an opening into the basement had been cut through a brick wall and a double door inserted. (R. 14.) On the way around Johnson passed an open window through which he saw a still and heard the pump of an oil burner in operation. (R. 17.) Upon reaching the rear door the agents heard two men talking in the basement. Johnson called out "Hello," and after a few minutes the petitioner Ehrett opened the door and came out. Johnson asked him whether he had a still in there, and, upon his replying "No," asked whether he cared if the officers went in to look. Ehrett answered "No," and was starting to leave when Johnson told him that he would have to go with the agents, thus plac-

ing him under arrest before any search was made. (R. 14, 16, 17–18, 20.) Taking Ehrett with them, the agents entered the basement and there found a 300-gallon still in operation, a 10-horsepower boiler, an oil burner, a motor pump, 22 five-gallon cans of uncolored spirits, a 15-gallon still set up but not operating, two barrels of mash, and a 15-gallon wooden keg containing "some kind of alcoholic liquor." From the larger still a 9-foot column extended through a wooden compartment or shaft leading from the basement to the attic, where it was connected with a 100-gallon condenser. (R. 14–16, 18, 19.) Ehrett turned off the oil burner which was under the steam boiler. (R. 20.) He told the officers that the "outfit" or "plant" belonged to him[4] and asked "couldn't we fix this." (R. 15, 16, 20.) Two of the officers climbed up the still column to the attic and found the petitioner Rossi hiding behind a projecting piece of wood under the eaves. He was wearing a blue work shirt and had grease and oil on his hands. He told the officers that he had been called to the house to fix a pump; that he did not know that there was a still there, and that he had just arrived when the officers came. (R. 15, 18, 20.) The officers had no search warrant. (R. 19.)

Mrs. Adolph Faux, called by the court as a witness, testified that she had lived on the premises

[4] One of the two agents who testified that Ehrett said the "plant" or "outfit" was his, on cross-examination stated that "Ehrett said it wasn't his still." (R.21.)

in question for about nine months prior to September 10, 1929, and that she was there on that day when the raid took place; that there were five rooms and a bath in the house, all on one floor; that she had rented the property from a "Mr. Velde" for $30 a month, and had sublet the basement about a week and a half before the raid to "Mr. John Smith, of Pekin" for $100 a month; that immediately upon her renting the basement the stairs from the kitchen to the basement were taken out and the kitchen door leading to that stairway was padlocked and nailed up so that she could not use it; that she had reserved the whole house for herself except what she had rented to John Smith, but had stayed there only once in a while, as she was having trouble with her husband and they had separated about three weeks before she rented the basement; that she knew the defendant Rossi when she saw him, and also knew "the man sitting next to him [Ehrett] but not to speak to him," and that she had never seen either of them "around there." (R. 24–25.) Upon cross-examination Mrs. Faux stated that neither Rossi nor Ehrett was a guest of hers on the day of the raid; that she did not see either of them that day; that between the day she rented the basement and the day the raid occurred she did not authorize anyone to live in the rooms of the house, and that to her knowledge no one stayed in those rooms. (R. 27.)

One of the prohibition agents testified that petitioner Ehrett said, apparently at the time of the raid, that he lived at 1115 South Fourth Street, in Pekin, and a mail carrier testified that during September, 1929, he "delivered letters to Peter Rossi at 731 Prince Street." (R. 22.) The premises searched were located at 1516 South Fifth Street.

The petitioners called as a witness the husband of Mrs. Faux, who testified that he examined the premises in question on the morning of September 11, 1929, the day following the search, and that at that time the door leading from the kitchen to the basement was not nailed and the basement steps were intact, with the exception of the middle step, which was just hanging down. He also testified that during the latter part of August, 1929, he asked petitioner Ehrett, whom he had known a long time, to go out to the witness's house and fix a radio which he had bought of Mr. Ehrett. (R. 28–29.)

The Government stipulated that prior to their search of the premises the agents did not know that "any door had been locked or closed or nailed causing a separation from the basement, of * * * [the] premises." (R. 30.)

ARGUMENT

I

It is well settled that an objection to evidence on the ground that it was obtained in violation of the Constitution or laws of the United States is avail-

able only to one whose rights have been invaded by the acts claimed to be unlawful. *Agnello* v. *United States*, 269 U. S. 20, 35; *Chicco* v. *United States*, 284 Fed. 434, 436 (C. C. A. 4th); *Lewis* v. *United States*, 6 F. (2d) 222, 223 (C. C. A. 9th); *Graham* v. *United States*, 15 F. (2d) 740, 742 (C. C. A. 8th); *United States* v. *Messina*, 36 F. (2d) 699, 700 (C. C. A. 2d); *In re Dooley*, 48 F. (2d) 121 (C. C. A. 2d). In their motion to suppress petitioners made no claim of any ownership of or interest in the property seized. Their assertion therein that their rights under the Constitution and laws of the United States had been violated was based solely upon the allegation that "they were each guests, and as such guests temporarily domiciled at the private dwelling of one Nellie Faux, in the City of Pekin, Illinois." (R. 11.) No evidence was submitted by them in support of that allegation, and it was fully refuted by the testimony of Mrs. Faux that petitioners were not her guests or residing in her home at the time of the search and seizure, and that she had never seen either of them around there. (R. 25, 27.)

If it be assumed that, by reason of its having been partitioned off from the remainder of the dwelling, that part of the house in which the search and seizure took place comprised separate premises, the assumption would not aid petitioners, for the evidence shows that the segregated portion was leased

to one John Smith (R. 25) and fails to show any interest of petitioners in such lease.

No claim is made in the petition to suppress that petitioners were in the premises either as employees of the "owners" of the property seized or of the premises searched, as intimated in the petition and supporting brief (pp. 4, 10), and there is nothing in the evidence to that effect. There is testimony in the record which indicates that petitioner Ehrett was the owner of the "outfit" or "plant," although there is a conflict as to that, and there is also defense testimony that Ehrett was asked to go to the premises to repair a radio which had been purchased from him. No claim was made in the petition to suppress by Ehrett as owner of the seized property. Rossi asserted that he did not know that there was a still on the premises and that he went there to fix a pump.

The cases cited by petitioners to the effect that persons domiciled upon the premises searched as guests or employees of the owner may invoke the protection of the Fourth Amendment are not in point, as the evidence in the instant case does not show that either petitioner was a guest or employee.

The cases cited by petitioners involving the search of private dwellings are also inapplicable. The evidence in this case shows a complete severance, physical and legal, of the basement from the living quarters on the first floor of the premises. The occupant of the living quarters leased the basement and thereafter was not permitted to use it by

her sublessee. In fact, she was barred from such use by the removal of the steps which led from the basement to the first floor and by the nailing of the door at the head of the steps.

Moreover, the evidence introduced by the Government, reviewed at length at pp. 4–5, *supra,* clearly shows that the officers had reasonable grounds to believe that the manufacture of intoxicating liquor was being carried on in the basement in question and that those engaged in or aiding in the manufacture of such liquor were then in the basement. Accordingly, the search of the premises was authorized as incident to the lawful arrest of the petitioners for an offense committed in the presence of the officers. In addition, there is evidence tending to show a consent to the search by the one who called himself the owner of the "outfit" or "plant." That the search was not unreasonable in extent is not disputed. There is no adequate showing, we submit, that the search violated the constitutional rights of the petitioners.

Taylor v. *United States,* 286 U. S. 1, also relied upon by petitioner, is unlike the instant case. There this Court specifically pointed out that "No one was within the place" searched "and there was no reason to think otherwise."

II

Each count of the indictment alleged that the offense therein charged was committed "at * * * the City of Pekin * * * in the State

of Illinois, in the * * * Southern District aforesaid * * *," and the evidence showed the offense to have been committed in Pekin and therefore within the jurisdiction of the court. But, because the offense was additionally alleged to have been committed within the Eighth Internal Revenue Collection District of Illinois and within the Thirteenth Prohibition District of the United States, petitioners contend that it was incumbent upon the Government to establish that Pekin was within these administrative districts, and that having failed to do so the conviction of petitioners was unlawful. It is well established, however, that the courts will take judicial notice of the location and extent of the administrative subdivisions of the United States. *United States* v. *Jackson,* 104 U. S. 41, 42. See *Caha* v. *United States,* 152 U. S. 211, 221–222; *Hoyt* v. *Russell,* 117 U. S. 401, 404–405; *Crinnian* v. *United States,* 1 F. (2d) 643, 644–645 (C. C. A. 6th). Proof that the offense was committed within the administrative districts alleged was, therefore, not required.

Petitioners contend further that the evidence was insufficient to sustain their convictions under the third and fourth counts since it failed to show that the still referred to in those counts was not registered with the appropriate prohibition administrator, that the required bond was not given, and that petitioners were persons required to register the still and to execute the bond. This contention was not brought to the attention of the trial court

by an appropriate motion or otherwise, and accordingly we think that petitioners are not in a position to raise the point in this Court. *Ayers* v. *United States,* 58 F. (2d) 607, 609 (C. C. A. 8th).

Moreover, we think the contention is lacking in merit. The possession by petitioners of a still found in the process of distilling spirits unlawfully having been established by the evidence, the burden was cast upon them to show that the still was duly registered and the bond given, or that they were not persons required to register the still or give the bond. See *Barton* v. *United States,* 267 Fed. 174, 175 (C. C. A. 4th); *Giacolone* v. *United States,* 13 F. (2d) 108, 110 (C. C. A. 9th); *Cardenti* v. *United States,* 24 F. (2d) 782, 783 (C. C. A. 9th); *Mangiaracina* v. *United States,* 40 F. (2d) 164, 166 (C. C. A. 8th); *Stark* v. *United States,* 44 F. (2d) 946, 949–950 (C. C. A. 8th). As stated in *Giacolone* v. *United States, supra.*

> It is further contended that the burden of proof was on the government to show that the stills were not registered and that the plaintiff in error failed to give bond. But the fact of registration and the fact of giving bond were peculiarly within the knowledge of the plaintiff in error, and the burden was therefore upon him to show a compliance with the requirements of the statute.

The evidence recited at pp. 4–6, *supra,* tends to show that petitioner Ehrett either actually was the owner of the distilling "outfit," or "plant,"

or had such complete control and possession thereof as to come within the class of persons required to register a still and give the statutory bond. (Sec. 3258, R. S., U. S. C., Title 26, Sec. 281; Sec. 3259, R. S., U. S. C., Title 26, Sec 282; Sec. 3260, R. S., U. S. C., Title 26, Sec. 284.) As the evidence was ample to support the finding that the petitioner Rossi was aiding and abetting Ehrett in the violations of law charged in the indictment, the conviction of Rossi as a principal in the commission of such offenses was fully justified without a showing that Rossi also was a person required to register the still and give the bond. (Sec. 332, Crim. Code; U. S. C., Title 18, Sec. 550.)

Mansbach v. *United States,* 11 F. (2d) 221 (C. C. A. 3d), cited by petitioners, appears to hold that it was incumbent upon the Government affirmatively to establish that the still was not registered and that the required bond was not given, and this is inconsistent or in conflict with the decisions above cited. Although the contention as to the insufficiency of the evidence to sustain the convictions upon the third and fourth counts was not made in the trial court, it was presented to and decided by the Circuit Court of Appeals. There thus appears to be a conflict between the decision in the *Mansbach case* and the decisions in the instant case and other cases above cited.

CONCLUSION

The case was correctly decided below. It presents no question of sufficient general importance to warrant a review on certiorari, except the question presented by the conflict between the decision in the *Mansbach case* and the decisions in the case at bar and other like cases. We do not oppose the granting of a writ of certiorari but suggest that if certiorari be granted the review of the instant case be limited to the question of the sufficiency of the evidence to support the convictions under the third and fourth counts.

Respectfully submitted.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	3
Statement	4
Summary of argument	8
Argument	8
Conclusion	19

CITATIONS

Cases:

Agnew v. *United States*, 165 U. S. 36	12
Ayers v. *United States*, 58 F. (2d) 607	9
Barton v. *United States*, 267 Fed. 174	10
Blackman v. *Commonwealth*, 124 Pa. 578	15
Cardenti v. *United States*, 24 F. (2d) 782	10
Clyatt v. *United States*, 197 U. S. 207	9
Colasurdo v. *United States*, 22 F. (2d) 934	10, 17
Davis v. *United States*, 160 U. S. 469	12
Dunlop v. *United States*, 165 U. S. 486	12
Faraone v. *United States*, 259 Fed. 507	10
Gains v. *State*, 149 Ala. 29	14
Giacolone v. *United States*, 13 F. (2d) 108	10, 11, 17
Goodfriend v. *United States*, 294 Fed. 148	10
Hornberger v. *State*, 47 Neb. 40	15
King v. *Burdett*, 4 B. & Ald. 95	15
Lindsey v. *United States*, 264 Fed. 94, certiorari denied, 252 U. S. 583	12
Mangiaracina v. *United States*, 40 F. (2d) 164	10, 17
Mansbach v. *United States*, 11 F. (2d) 221	2, 15, 16
McCurry v. *United States*, 281 Fed. 532	10
Moore v. *State*, 154 Ark. 13	14
Morris v. *United States*, 161 Fed. 672	10
Otto v. *United States*, 29 F. (2d) 504	17
Parker v. *State*, 61 N. J. L. 308	15
People v. *Boo Doo Hong*, 122 Cal. 606	14
People v. *Montgomery*, 271 Ill. 580	14
People v. *Willi*, 109 Misc. Rep. 79 affirmed 184 N. Y. Supp. 943	15

Cases—Continued. Page

Seiden v. *United States*, 16 F. (2d) 197 ... 10
Sharp v. *United States*, 280 Fed. 86, certiorari denied, 260 U. S. 730 ... 10
Silva v. *United States*, 35 F. (2d) 598, 38 F. (2d) 465 certiorari denied, 281 U. S. 751 ... 9
Smith v. *Commonwealth*, 196 Ky. 188 ... 14
Stark v. *United States*, 44 F. (2d) 946 ... 10
State v. *Casto*, 231 Mo. 398 ... 15
State v. *Crowell*, 25 Me. 171 ... 14–15
State v. *Hays*, 38 S. D. 546 ... 15
State v. *Posey*, 157 La. 55 ... 14
State v. *Shaw*, 35 N. H. 217 ... 15
State v. *Shelton*, 16 Wash. 590 ... 15
United States v. *Messina*, 36 F. (2d) 699 ... 17
Vuckich v. *United States*, 28 F. (2d) 666, certiorari denied, 279 U. S. 847 ... 10, 17, 19
Wiborg v. *United States*, 163 U. S. 632 ... 9
Wilson v. *United States*, 162 U. S. 613 ... 12
Yee Hem v. *United States*, 268 U. S. 178 ... 12, 13

Statutes:

Criminal Code, Sec. 332 (U. S. C., Title 18, Sec. 550) ... 17
Revised Statutes—
Sec. 3258 (U. S. C., Title 26, Sec. 281) ... 3
Sec. 3259 (U. S. C., Title 26, Sec. 282) ... 17
Sec. 3260 (U. S. C., Title 26, Sec. 284) ... 3
Sec. 3266 (U. S. C., Title 26, Sec. 291) ... 18
Sec. 3281 (U. S. C., Title 26, Sec. 306) ... 4
National Prohibition Act, c. 85, Sec. 32, Title II, 41 Stat. 317 (U. S. C., Title 26, Sec. 49) ... 13

Miscellaneous:

Bishop, Statutory Crimes, 3d Ed., Sec. 1051 ... 14
Chamberlayne's Modern Law of Evidence, Vol. 2, Sec. 983 ... 13
Greenleaf on Evidence, 16th Ed., Vol. 1, Sec. 79, p. 154 ... 14
Wharton, Criminal Evidence, 10th Ed., Vol. 1, Sec. 332 ... 14
Wigmore on Evidence, 2d Ed.—
Sec. 2486 ... 11
Sec. 2487 ... 11
Sec. 2489 ... 11
Sec. 2501 ... 12
Sec. 2512 ... 11, 12, 14
Sec. 2513 ... 12
Thayer, A Preliminary Treatise on Evidence (1898) ... 12
Zechariah Chafee, Jr., "The Progress of the Law, 1919–1921," 35 Harv. L. R. 302 ... 12

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No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 52–54) is reported in 60 F. (2d) 955.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1932. (R. 55.) A petition for rehearing was denied October 7, 1932. (R. 56.) The petition for certiorari was filed January 4, 1933, and was granted February 6, 1933, limited as hereinafter set forth. (R. 58.) The jurisdiction

of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the evidence was sufficient "to support conviction upon the third and fourth counts." (R. 58.)[1] More specifically, the question presented is whether upon the evidence the trial judge was warranted in finding (*a*) that the still found in petitioners' custody and control, while being used for the unlawful manufacture of distilled spirits, was not registered, as alleged in the fourth count, and (*b*) that the required distiller's bond had not been given, as alleged in the third count.

---

[1] The limitation of the writ of certiorari to this question was in accordance with the suggestion contained in the Government's brief heretofore filed in this case (p. 14). The Government's suggestion was expressly predicated upon the conflict between the instant case and *Mansbach* v. *United States*, 11 F. (2d) 221 (C. C. A. 3d); in all other respects the petition for certiorari was opposed. The conflict related solely to the adequacy of the proof with respect to the allegation in the third count (R. 5) that the statutory bond had not been executed and the allegation in the fourth count (R. 6) that the still had not been registered. This brief is accordingly confined to a discussion of these points.

While the sufficiency of the evidence to support conviction upon the third and fourth counts was challenged in the petition for certiorari upon other grounds, we deem it to have been the intention of this Court to limit review to the points discussed in this brief. If we are wrong in this assumption, we respectfully refer to our memorandum filed in response to the petition for a discussion of petitioners' contentions upon points not covered by this brief.

STATUTES INVOLVED

Section 3258 of the Revised Statutes (U. S. C., Title 26, Sec. 281) provides:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same * * *. Stills and distilling-apparatus shall be registered immediately upon their being set up. * * * And every person having in his possession or custody, or under his control, any still or distilling-apparatus set up which is not so registered, shall pay a penalty of five hundred dollars, and shall be fined not less than one hundred dollars, nor more than one thousand dollars, and imprisoned for not less than one month, nor more than two years.

Section 3260 of the Revised Statutes (U. S. C., Title 26, Sec. 284) provides:

> Every person intending to commence or to continue the business of a distiller shall * * * before proceeding with such business * * * execute a bond [with specified conditions]. * * * Every person who fails or refuses to give the bond hereinbefore required * * * shall forfeit the distillery, distilling-apparatus, and all real estate and premises connected therewith, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

STATEMENT

Petitioners were indicted in the District Court of the United States for the Southern District of Illinois upon five counts charging violations of the internal revenue laws. (R. 2–7.) The third and fourth counts, which are the only ones here involved (R. 58), charged, respectively, the carrying on of the business of a distiller without having given the bond required by law (Sec. 3260, R. S.;[2] U. S. C., Title 26, Sec. 284), and the custody and control of a still without the same being registered as required by law (Sec. 3258, R. S.; U. S. C., Title 26, Sec. 281) (R. 4–6). Following a trial, which by written stipulation was without a jury (R. 13), the trial judge found petitioners guilty on all counts (R. 30), but subsequently set aside the conviction on the fifth count (R. 10). Each petitioner was sentenced, on the third count, to serve eighteen months' imprisonment and to pay a fine of $500, the prison sentence to run concurrently with like sentences imposed upon the first and second counts, and on the fourth count, to serve eighteen months' imprisonment and to pay a fine of $500, the prison sentence to run consecutively to those imposed on the first three counts. (R. 9–10.) Upon appeal to the Circuit Court of Appeals the judgment was affirmed. (R. 55.) This Court granted a writ of certiorari "limited to the question of the sufficiency

[2] See also Sec. 3281, R. S.; U. S. C., Title 26, Sec. 306.

of the evidence to support conviction upon the third and fourth counts." (R. 58.)

At the trial the Government adduced evidence which, if believed, tended to establish the following facts: On September 8, 1929, Federal Prohibition Agent Wheeler smelled the odor of fermenting mash emanating from the one-story frame dwelling house (R. 16, 19, 24, 28) at 1516 South Fifth Street, Pekin, Illinois, and heard the buzz or hum of an electric pump in the basement (R. 14). He returned to the premises on September 10, 1929, accompanied by Agent Johnson and other agents. As the officers drove up to the place they smelled the odor of cooking alcohol. (R. 17, 20.) Two of them went around the building on one side and two on the other side to the rear, where an opening into the basement had been cut through a brick wall and a double door inserted. (R. 14.) On the way around Johnson passed an open window through which he saw a still and heard the pump of an oil burner in operation. (R. 17.) Upon reaching the rear door the agents heard two men talking in the basement. Johnson called out "Hello," and after a few minutes the petitioner Ehrett opened the basement door and came out. Johnson asked him whether he had a still "down there" and, upon his replying "No," asked whether he cared if the officers went in to look. Ehrett answered "No," and was starting to leave, when Johnson told him that he would have to go

with the agents, thus placing him under arrest. (R. 14, 16, 17–18, 20.)

Taking Ehrett with them, the agents entered the basement and there found a 300-gallon still in operation, a 15-gallon still, not in operation but set up ready for use, a 10-horsepower boiler, an oil burner, a motor pump, several barrels of mash, a quantity of alcohol, 22 five-gallon cans of uncolored spirits, and a 15-gallon wooden keg containing "some kind of alcoholic liquor." From the larger still a 9-foot column extended through a wooden compartment or shaft leading from the basement to the attic, where it was connected with a 100-gallon condenser. (R. 14–16, 17, 18, 19, 20.) Ehrett turned off the oil burner which was under the steam boiler. (R. 20.) He told the officers that the "outfit" or "plant" belonged to him[3] and asked "couldn't we fix this?" (R. 15, 16, 19, 20.) Two of the officers climbed up the still column to the attic and found the petitioner Rossi hiding behind a projecting piece of wood under the eaves. He was wearing a blue work shirt and had grease and oil on his hands. He told the officers that he had been called to the house to fix a pump; that he did not know there was a still there; that he had just arrived when the officers came; that this was the second still at which he had been caught and that he "wanted to fix it up." (R. 15, 18, 20, 21.)

[3] One of the two agents who testified that Ehrett said the "plant" or "outfit" was his (R. 15, 20), on cross-examination stated that "Ehrett said it wasn't his still." (R. 21.)

Mrs. Adolph Faux, called by the court as a witness (R. 24), testified that she had lived on the premises in question for about nine months prior to September 10, 1929, and that she was there on the day when the raid took place; that there were five rooms and a bath in the house, all on one floor; that she had rented the property from a "Mr. Velde" for $30 a month, and had sublet the basement about a week and a half before the raid to "Mr. John Smith, of Pekin," for $100 a month; that immediately upon her renting the basement the stairs from the kitchen to the basement were taken out and the kitchen door leading to that stairway was padlocked and nailed up so that she could not use it; that she had reserved the whole house for herself except what she had rented to John Smith; that she knew the defendant Rossi when she saw him, and also knew "the man sitting next to him [Ehrett] but not to speak to him," and that she had never seen either of them "around there." (R. 24–25.) Upon cross-examination Mrs. Faux stated that neither Rossi nor Ehrett was a guest of hers on the day of the raid, that she did not see either of them that day, that between the day she rented the basement and the day the raid occurred she did not authorize anyone to live in the rooms of the house, and that to her knowledge no one stayed in those rooms. (R. 27.)

The petitioners did not take the witness stand and introduced no evidence tending to show that

the still was registered or that the statutory bond had been given.

SUMMARY OF ARGUMENT

The evidence introduced by the Government clearly established that petitioners were arrested while having custody and control of a still and while engaged in the unlawful distillation of alcoholic spirits. Upon this proof the trial court was warranted in finding, in the absence of evidence to the contrary, that the still was not registered and that the statutory bond had not been given. It has been repeatedly held, under indictments similar to the one here involved, that proof of the custody of a still and of the unlawful distillation of alcoholic spirits gives rise to an inference of lack of registration and failure to give bond which it is incumbent upon the defendant to overcome by evidence to the contrary.

Moreover, even if the Government was required to establish by direct evidence that the still was not registered and the bond not given, it adequately met this burden by showing that the still, which was in a "dwelling house" or "enclosure connected with" a dwelling house, was one which could not legally have been registered and with respect to which no distiller's bond could lawfully have been given.

ARGUMENT

The contention that the evidence was not sufficient to sustain petitioners' conviction upon the

third and fourth counts was not presented to the trial court during the course of the trial by appropriate motion or otherwise. Although it was presented to (R. 35) and passed upon (R. 54) by the Circuit Court of Appeals, the general rule is well settled that an appellate court may review only rulings made by the trial court on questions brought to the attention of and passed upon by the trial court. *Ayers* v. *United States,* 58 F. (2d) 607 (C. C. A. 8th); *Silva* v. *United States,* 35 F. (2d) 598 (C. C. A. 9th). Accordingly, if the Circuit Court of Appeals possessed authority to pass upon the sufficiency of the evidence, such authority must rest upon the rule that in a criminal case an appellate court may notice a "plain error" in a matter "vital to the defendants" even though the error was not brought to the attention of or ruled upon by the trial court. *Wiborg* v. *United States,* 163 U. S. 632, 658–600; *Clyatt* v. *United States,* 197 U. S. 207, 221–222.

The character of the place and manner of petitioners' operations, their conduct at the time of the search and arrest, their failure at the time to make any explanation of the incriminating facts discovered by the searching officers, and other facts shown by the evidence, as set forth in the statement of facts (pp. 5–7, *supra*), clearly establish that the petitioners were arrested while having custody and control of a still and while engaged in the unlawful

distillation of alcoholic spirits. These facts having been plainly demonstrated, the trial judge was warranted in finding, in the absence of evidence to the contrary, that the still was not registered, as charged in the fourth count, and that the statutory bond had not been given, as charged in the third count. It has repeatedly been held that proof of the unlawful custody or control of a still and of the unlawful distillation of alcoholic spirits gives rise to an inference of lack of registration and failure to give bond which it is incumbent upon the defendant to overcome by proof to the contrary. *Barton* v. *United States,* 267 Fed. 174, 175 (C. C. A. 4th); *McCurry* v. *United States,* 281 Fed. 532, 533 (C. C. A. 9th); *Goodfriend* v. *United States,* 294 Fed. 148, 150 (C. C. A. 9th); *Giacolone* v. *United States,* 13 F. (2d) 108, 110 (C. C. A. 9th); *Seiden* v. *United States,* 16 F. (2d) 197, 199 (C. C. A. 2d); *Colasurdo* v. *United States,* 22 F. (2d) 934, 935 (C. C. A. 9th); *Cardenti* v. *United States,* 24 F. (2d) 782, 783 (C. C. A. 9th); *Mangiaracina* v. *United States,* 40 F. (2d) 164, 166 (C. C. A. 8th); *Stark* v. *United States,* 44 F. (2d) 946, 949–950 (C. C. A. 8th). And see *Vukich* v. *United States,* 28 F. (2d) 666, 669 (C. C. A. 9th), certiorari denied, 279 U. S. 847; *Sharp* v. *United States,* 280 Fed. 86, 89 (C. C. A. 5th), certiorari denied, 260 U. S. 730; *Morris* v. *United States,* 161 Fed. 672, 677 (C. C. A. 8th); *Faraone* v. *United States,* 259 Fed. 507,

509 (C. C. A. 6th). Thus, in *Giacolone* v. *United States, supra,* the court said (p. 110):

> It is further contended that the burden of proof was on the government to show that the stills were not registered and that the plaintiff in error failed to give bond. But the fact of registration and the fact of giving bond were peculiarly within the knowledge of the plaintiff in error, and the burden was therefore upon him to show a compliance with the requirements of the statute.[4]

The cases above cited find support in firmly established principles of the law of evidence. Concededly, in criminal cases, the burden of establish-

[4] Some of the Federal cases above cited and certain of the State decisions cited at p. 15, *infra*, seem to hold that after the prosecution has shown the unlawful custody and operation of a still the defendant has the burden of proving, by a preponderance of evidence, that the still was registered and that the statutory bond was given. The other cases apparently take the view that the effect of the evidence adduced by the prosecution is merely to shift to the defendant the burden of going forward with some evidence to show that the still was not registered or the bond not given, with the result that conviction follows if the defendant fails to introduce any evidence with respect to these issues. All of the cases cited necessarily hold that the evidence adduced by the prosecution gives rise to an inference that the still was not registered and bond not given, which is sufficient to take the case to the jury. See Wigmore on Evidence, 2d Ed., §§ 2486, 2487, 2489, 2512. It is not necessary in the instant case to determine which of these views is correct, since the only question here is the sufficiency of the evidence to sustain the convictions. Obviously under either view the decision of the Circuit Court of Appeals was correct.

ing guilt rests upon the prosecution throughout the trial, but as this Court pointed out in *Agnew* v. *United States,* 165 U. S. 36, 50—

> when a *prima facie* case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused.[5]

Moreover, as pointed out by Professor Wigmore (Wigmore on Evidence, 2d Ed., § 2512)—

> the fixing of a particular fact on this or that party as a part of his case is in general only a question of sound policy as based on experience.[6]

In recognition of these principles, and as the result of judicial experience with certain issues in criminal trials, it has frequently been held that negative averments of facts peculiarly within the knowledge of the defendant need not be directly

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[5] See also *Yee Hem* v. *United States*, 268 U. S. 178, 184–185; *Dunlop* v. *United States*, 165 U. S. 486, 502–503; *Wilson* v. *United States*, 162 U. S. 613, 619; *Lindsey* v. *United States*, 264 Fed. 94, 96 (C. C. A. 4th) certiorari denied, 252 U. S. 583. The shifting to the defendant of the burden of going forward with the evidence on certain issues of fact finds frequent, though varying, illustrations in criminal prosecutions where the issues of insanity and self-defense are raised, or in prosecutions involving the possession of stolen goods. See Wigmore on Evidence, 2d Ed. §§ 2501, 2512, 2513. See *Davis* v. *United States*, 160 U. S. 469, 486–488.

[6] See also Thayer, A Preliminary Treatise on Evidence (1898), pp. 549–550; Zechariah Chafee, Jr., "The Progress of the Law, 1919–1921," 35 Harv. L. R. 302, 311.

and specifically proved by the prosecution.[7] Thus, it is almost uniformly held that in a prosecution for the doing of an act which is unlawful unless done under a license or permit, proof of the doing of the act casts upon the defendant the burden of going forward with evidence to prove that he acted with authority.

In Chamberlayne's Modern Law of Evidence, Vol. 2, Sec. 983, the principle governing this class of cases is thus stated:

> the rule—that he who has the better knowledge, especially if he can with it make affirmative proof, is under the burden of evidence—has been widely accepted both in England and America. * * * Thus where one is accused of doing an act which would be unlawful unless the doer has received a special authority permission of law, the government may properly allege that he has done the act—e. g., that he has operated a ferry, practiced medicine, sold intoxicating liquor or the like without license or authority in law. When the act itself is proved, it may then be required of the *defendant* that he then himself exhibit and prove his license and authority;—the burden of evidence being shifted to him for that purpose. The short reason for this requirement is that

[7] Recognition of the policy behind this rule is frequently found in statutes. Thus, Section 32, Title II, of the National Prohibition Act (U. S. C., Title 27, Sec. 49) provides that an indictment under that Act need not include "any defensive negative averments." See also *Yee Hem* v. *United States*, 268 U. S. 178.

> license or authority is a fact easy for him to prove and difficult for the prosecution to disprove.

In Greenleaf on Evidence, 16th Ed., Vol. 1, Sec. 79, p. 154, the following statement of the doctrine is given:

> But where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great.

See also Wigmore on Evidence, 2d Ed., Sec. 2512 (d), footnote 4; Bishop, Statutory Crimes, 3d Ed., Sec. 1051; Wharton, Criminal Evidence, 10th Ed., Vol. I, Sec. 332.

The principle has also been generally recognized and followed in the State courts. See *Gains* v. *State,* 149 Ala. 29, 32; *Moore* v. *State,* 154 Ark. 13, 15–16; *People* v. *Boo Doo Hong,* 122 Cal. 606, 607–608; *People* v. *Montgomery,* 271 Ill. 580, 582; *Smith* v. *Commonwealth,* 196 Ky. 188, 190–192; *State* v. *Posey,* 157 La. 55, 58; *State* v. *Crowell,*

25 Me. 171, 173; *State* v. *Casto,* 231 Mo. 398, 408; *Hornberger* v. *State,* 47 Neb. 40, 45; *State* v. *Shaw,* 35 N. H. 217, 219; *Parker* v. *State,* 61 N. J. L. 308, 312; *People* v. *Willi,* 109 Misc. Rep. 79, affirmed, 184 N. Y. Supp. 943; *Blackman* v. *Commonwealth,* 124 Pa. 578, 582–583; *State* v. *Hays,* 38 S. D. 546; *State* v. *Shelton,* 16 Wash. 590, 592. See also *King* v. *Burdett,* 4 B. & Ald. 95, 140.

The only decision at substantial variance with that of the instant case which has come to our attention is *Mansbach* v. *United States,* 11 F. (2d) 221 (C. C. A. 3d). There, in setting aside the defendant's conviction upon charges similar to those here involved, the court said (pp. 223–224):

> The plea of not guilty entered in the case at bar is a denial by the defendant that he operated the stills without registering, paying the tax, or giving bond. Failure to register, to pay the tax, and give bond when operating the stills are the acts which, under the law, constitute the offenses and we can not hold that implicit either in the defendant's silence or in his denial of the commission of the offense there is an admission of its commission. The question of guilt is to be determined by evidence of the doing or failure to do what the law forbids or requires.
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> * * * * *
>
> These provisions [of the internal revenue laws] forbid the distillation of liquor without compliance with their requirements.

> When not complied with, a still is illicit; when complied with, a still is licit, so far as it is affected by this class of legislation. It is a wholly lawful or a wholly unlawful thing, and when in a criminal action under the revenue laws it is charged to be unlawful, its character can not be determined merely by possession but must be determined by evidence that its possession is not accompanied with the formal requirements of those laws. Conclusive evidence of such facts is always available at the office of the local collector of internal revenue. There is in the record no evidence of any kind on these issues.

As in the case at bar, the evidence in the *Mansbach case,* set out in the dissenting opinion of Judge Buffington, was ample to establish the custody and control by the defendant of a still which was being used by him for the unlawful distillation of alcoholic spirits. In holding that this proof did not sustain defendant's conviction in the absence of direct proof by the Government that the still was not registered and the required bond not given, the *Mansbach* decision is opposed to the overwhelming weight of authority and, we submit, is erroneous.

In the petition for certiorari (p. 9) petitioners allege that there was no evidence showing that petitioners "were persons who were required to register the alleged still or execute bond herein." No argument was made in support of this contention, and we think it is unfounded.

The evidence recited at pp. 5–7, *supra,* tends to show that petitioner Ehrett either was the owner of the distilling "outfit," or "plant," or had such control and custody thereof as to come within the class of persons required to register a still and give the statutory bond. (See Sec. 3258, R. S., U. S. C., Title 26, Sec. 281; Sec. 3259, R. S., U. S. C., Title 26, Sec. 282; Sec. 3260, R. S., U. S. C., Title 26, Sec. 284. See also *United States* v. *Messina,* 36 F. (2d) 699, 701 (C. C. A. 2d); *Mangiaracina* v. *United States,* 40 F. (2d) 164, 166 (C. C. A. 8th), *supra; Otto* v. *United States,* 29 F. (2d) 504 (C. C. A. 7th); *Colasurdo* v. *United States,* 22 F. (2d) 934, 935 (C. C. A. 9th), *supra; Giacolone* v. *United States,* 13 F. (2d) 108, 110 (C. C. A. 9th), *supra.* While there was no evidence that Rossi owned any interest in the still, we think the trial court was warranted in finding that he had control or custody thereof. Moreover, since there was ample evidence to support a finding that Rossi was aiding and abetting Ehrett in the violations of law charged in the third and fourth counts, his conviction as a principal in the commission of such offenses was fully justified without a showing that he also was a person required to register the still and give a bond. (See Section 332 of the Criminal Code; U. S. C. Title 18, Sec. 550. See also *Vukich* v. *United States,* 28 F. (2d) 666, 668–669 (C. C. A. 9th), certiorari denied, 279 U. S. 847.)

Even if the failure to register the still and to give the required bond be regarded as facts as to which the petitioners at no stage of the trial were under any burden to adduce proof, we think the evidence was sufficient to sustain the convictions. The still in question was located in the basement of a dwelling house.[8] (R. 16, 19, 24, 28.) Section 3266 of the Revised Statutes, as amended (U. S. C., Title 26, Sec. 291), provides that—

> No person shall use any still * * * *in any dwelling house, or in any shed, yard, or inclosure connected with any dwelling house* * * *; and every person who does any of the acts prohibited by this section, or aids or assists therein, * * * shall be fined $1,000 and imprisoned for not less than six months nor more than two years, in the discretion of the court, * * * (Italics ours.)

We think that the prosecution sufficiently proved that the still was not registered and that the required bond was not given by the presentation of evidence which established that the still was one which could not legally have been registered and with respect to which no distiller's bond could law-

[8] Although there was evidence that the basement was sealed off from all the rest of the house except the attic and was apparently used only for the unlawful distilling operations (R. 14, 15, 24, 27, 30), the place searched is repeatedly referred to in the petition for certiorari as a "dwelling house."

fully have been given. See *Stark* v. *United States*, 44 F. (2d) 946, 949–950 (C. C. A. 8th), *supra*. Cf. *Vukich* v. *United States*, 28 F. (2d) 666, 669 (C. C. A. 9th), certiorari denied, 279 U. S. 847, *supra*.

CONCLUSION

The judgment of the Circuit Court of Appeals with respect to the third and fourth counts should be affirmed.

Respectfully submitted.

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